

(3)  
No. 87-1741



---

In The  
**Supreme Court of the United States**  
October Term, 1987

---

GERALD CORBELL, ET AL.,

*Petitioners,*

v.

KEVIN LEE STEVENS,

*Respondent.*

---

On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit

---

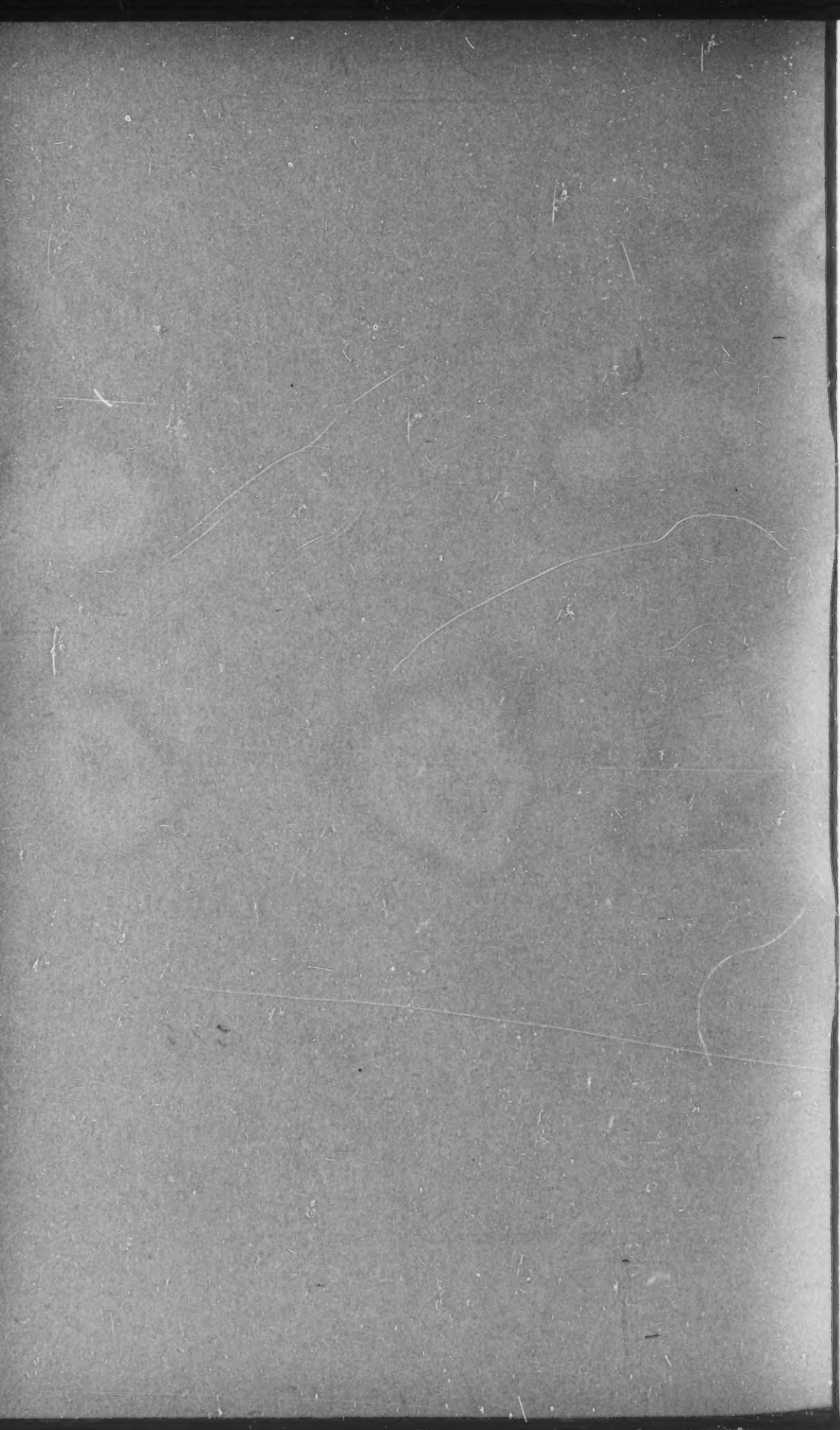
**RESPONDENT'S BRIEF IN OPPOSITION**

---

CURTIS B. STUCKEY  
STUCKEY & GARRIGAN  
2803 North Street  
P.O. Box 631902  
Nacogdoches, Texas 75963-1902  
(409) 560-6020

*Attorney for Respondent*

16 pp



**QUESTION PRESENTED**

Whether interlocutory appellate review of a new trial order in an excessive force case is properly limited to purely legal issues under the collateral order doctrine given that the appeal is only permissible because the police officers claim qualified immunity and given that the use of excessive force violates clearly established law?

**LIST OF PARTIES**

1. Gerald Corbell, Petitioner
2. Hal Wyatt, Petitioner
3. Jesse Wilburn, Petitioner
4. Kevin Lee Stevens, Respondent

## TABLE OF CONTENTS

	Page
Question Presented .....	i
List of Parties .....	ii
Table of Contents .....	iii
Table of Authorities .....	iv
Opinions Below .....	1
Jurisdiction .....	2
Constitutional and Statutory Provisions Involved.....	2
Statement of the Case .....	4
Summary of Argument .....	6
Reasons for Denying Writ .....	7
This Case Presents no Important Unsettled Questions .....	7
This Court in <i>Harlow</i> Defined the Scope of Qualified Immunity Available to Governmental Officials .....	7
This Court in <i>Mitchell</i> Defined the Narrow Scope of Review Available on Interlocutory Appeals Based on Qualified Immunity .....	8
There is no Conflict Among the Circuits or State Courts of Last Resort .....	9
Petitioners Misstate the Issue and this Court is not Likely to Reach the Question Presented if Certiorari is Improvidently Granted .....	9
Conclusion .....	11

## TABLE OF AUTHORITIES

Page

## CASES:

<i>Allied Chemical Corp. v. Diaflon, Inc.</i> , 449 U.S. 33 (1980) .....	8
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982) .....	6, 7
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985) .....	6, 8, 10, 11
<i>Stevens v. Corbell</i> , 798 F.2d 120 (5th Cir. 1986) .....	6
<i>Stevens v. Corbell</i> , 832 F.2d 884 (5th Cir. 1987) .....	6, 7, 8, 9

## CONSTITUTIONS, STATUTES AND RULES

U.S. Const., amend. XIV .....	2
28 U.S.C. § 2111 .....	3
28 U.S.C. § 1254(1) .....	2
28 U.S.C. § 1291 .....	3, 8
28 U.S.C. § 1292 .....	3
28 U.S.C. § 1292(b) .....	6
42 U.S.C. § 1983 .....	2, 4
Tex. Penal Code § 39.02 .....	4, 5

No. 87-1741

---

In The  
**Supreme Court of the United States**  
October Term, 1987

---

GERALD CORBELL, ET AL.,  
*Petitioners,*

v.

KEVIN LEE STEVENS,  
*Respondent.*

---

On Petition for Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit

---

**RESPONDENT'S BRIEF IN OPPOSITION**

---

TO THE HONORABLE JUSTICES OF THE  
SUPREME COURT:

Respondent Kevin Lee Stevens respectfully submits this brief in opposition to the petition for writ of certiorari, seeking review of the Fifth Circuit's opinion in this case.

## OPINIONS BELOW

Petitioners accurately state the status of the opinions below in their petition for writ of certiorari.

---

O

---

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and is not disputed.

---

O

---

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 42 U.S.C. § 1983

Every person who, under color of any state, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities



secured by the Constitution and laws, shall be liable to the party injured in an action at law, in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. 28 U.S.C. § 2111

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

4. 28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

5. 28 U.S.C. § 1292 provides in relevant part that:

Interlocutory decisions

(a) except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dis-

solving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

6. Section 39.02, Texas Penal Code, which provides, in pertinent part, as follows:

(a) A public servant acting under color of his office or employment commits an offense if he:

(1) intentionally subjects another to mistreatment . . . that he knows is unlawful; or

(2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, . . . or immunity, knowing his conduct is unlawful.

(b) [A] public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

---

o

### **STATEMENT OF THE CASE**

Respondent Stevens filed suit under 42 U.S.C. § 1983 against Petitioner Corbell for using excessive force and against Petitioners Wilburn and Wyatt for failing to protect Respondent Stevens from Petitioner Corbell. The

district court in relevant part instructed the jury as follows:

36. Section 39.02 of the Texas Penal Code sets out the circumstances under which state officials transgress their authority under state law. The court finds this statute to comport with the Constitution of the United States. It provides, in part, as follows:

(a) A public servant acting under color of his office or employment commits an offense if he:

(1) intentionally subjects another to mistreatment . . . that he knows is unlawful; or

(2) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, . . . or immunity, knowing his conduct is unlawful.

(b) [A] public servant acts under color of his office or employment if he acts or purports to act in an official capacity or takes advantage of such actual or purported capacity.

(App. E., 37a-38a).<sup>1</sup>

The erroneously charged jury returned a verdict for the petitioners. Respondent Stevens timely filed a motion for new trial which was based in part on the fact that the challenged jury instruction in substance permitted petitioners to intentionally subject Respondent Stevens to mistreatment unless petitioners knew that their conduct was unlawful and permitted petitioners to intentionally deny Respondent Stevens his constitutional rights unless petitioners knew their conduct was unlawful. The district court granted a new trial on the basis of the erroneous

---

<sup>1</sup> References are to the appendix filed by petitioners.

instruction without reaching the merits of the remaining grounds asserted by respondent. (App. C., 18a-26a).

Petitioners next submitted a motion to vacate the order granting a new trial or, alternatively, to appeal pursuant to 28 U.S.C. § 1292(b) and for a stay of district court proceedings pending the appeal which was denied. Petitioners next filed with the district court a notice of appeal to the Fifth Circuit Court of Appeals, and filed in the Fifth Circuit an emergency motion for stay of the district court proceedings pending an appeal. The stay was granted, *Stevens v. Corbell*, 798 F.2d 120 (5th Cir. 1986) (App. B., 16a-17a). The new trial order was subsequently affirmed, *Stevens v. Corbell*, 832 F.2d 884 (5th Cir. 1987) (App. A., 1a-15a). The court rejected petitioners' qualified immunity defense because the use of excessive force violates well-settled law. *Stevens v. Corbell*, 832 F.2d 884, 890 (5th Cir. 1987) (App. A., 13a).

---

O

---

### SUMMARY OF ARGUMENT

1. Qualified immunity does not protect governmental officials who violate the clearly established constitutional rights of a victim. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Further, the scope of review of an interlocutory appeal raising the qualified immunity defense is limited to purely legal issues. *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

2. The opinion in the case at bar is not in conflict with any decision of this Court, any appellate court, or any state court of last resort.

3. The erroneous jury instruction which provides the basis for a new trial does not have anything to do with qualified immunity.

—o—

## REASONS FOR DENYING THE WRIT

### This Case Presents No Important Unsettled Questions

#### A. This Court in *Harlow* Defined the Scope of Qualified Immunity Available to Governmental Officials

This Court has explicitly held that qualified immunity only shields governmental officials performing discretionary functions from liability for civil damages “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known”. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The qualified immunity defense is not available when the law is clearly established at the time of the alleged violation. *Harlow*, *Id* 818-819. In fact, the court below explicitly rejected petitioners’ qualified immunity defense precisely because there is no real dispute about what the law authorizes with regard to the knowing use of excessive force. *Stevens v. Corbell*, 832 F.2d 884, 890 (1987) (App. A., 13a). As the United States Court of Appeals succinctly stated in this case:

The law is and was clear in allowing a police officer to use only the amount of force he honestly believes is needed. Since it is well-settled in this Circuit that knowing use of excessive force in booking an arrestee violates the arrestee’s constitutional rights, the defense of qualified immunity is unavailable to a police

officer who the plaintiff has alleged thus used excess force.

*Stevens, Id.*, 890 (App. A., 13a).

**B. This Court in Mitchell Defined the Narrow Scope of Review Available on Interlocutory Appeals Based on Qualified Immunity**

It is now well established that an order granting a new trial is not appealable. *Allied Chemical Corp. v. Diaflon, Inc.*, 449 U.S. 33, 34 (1980). However, in *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985), this Court held that a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U.S.C. § 1291. This Court noted that the claim of immunity is conceptually distinct from the merits of plaintiff's claim that his rights have been violated, *Id.* 527-528 and succinctly set out the narrow scope of the interlocutory review:

We emphasize at this point that the appealable issue is purely a legal one: whether the facts alleged (by the plaintiff, or in some cases, the defendant) support a claim of violation of clearly established law.

*Mitchell, Id.*, at 528 n. 9.

The court below faithfully followed this Court's clear instructions and properly limited its review to legal error only. *Stevens v. Corbell*, 832 F.2d 884, 890-91 (1987) (App. A., 14a-15a).

**There is no Conflict Among the Circuits or State  
Courts of Last Resort**

The Fifth Circuit's opinion in *Stevens v. Corbell*, *supra*, does not conflict with any decision of this Court. Petitioners have failed to cite a single circuit or state court of last resort case that is in conflict with the Fifth Circuit's opinion in the case at bar because none exist.

**Petitioners Misstate the Issue and this Court is not  
Likely to Reach the Question Presented if Certiorari  
is Improvidently Granted**

The "Question Presented" by petitioners is not crystal clear. However, the case at bar is not an appropriate vehicle for further refining the scope of qualified immunity or the scope of appellate review following an interlocutory appeal.

Qualified immunity in this case is little more than a red herring asserted by petitioners in order to obtain an interlocutory appeal, thereby delaying Respondent Stevens' trial before a properly charged jury. As noted by the court below:

We think, however, that the district court's basis for granting the new trial goes more to the substantive elements a plaintiff must prove in his § 1983 claim than to the issue of qualified immunity. None of the interrogatories submitted to the jury dealt with qualified immunity. Although one part of the Court's jury charge did describe the qualified immunity defense, that instruction is not the one upon the basis of which a new trial was granted.

*Stevens v. Corbell*, *supra*, 834 F.2d at 887 (5th Cir. 1987) (App. A., 6a). In fact, jury instruction number 36 (App.

D., 37a-38a) which provided the basis for granting a new trial has nothing to do with qualified immunity.

It is also grossly inaccurate to imply in petitioners' question presented that petitioners have been vindicated in a trial without reversible error. (See Petition for Writ of Certiorari, Question Presented, p. i). The trial court specifically held that the erroneous instruction required a new trial and did not reach the remaining grounds asserted by respondent (App. C., 26a n. 5) and the appellate court (App. A., 1a-15a) has not had occasion to review the record to determine whether the challenged jury instruction which triggered the new trial or other grounds for new trial asserted by respondent and not reached by the trial court constitute reversible error.

It is clear that the challenged jury instruction which provided the basis for the new trial, standing alone, was extremely harmful to respondent because it improperly placed the heavy burden on respondent, as a prerequisite to recovery, to prove both that petitioners' wrongful acts were intentional and that petitioners' intentional wrongful acts were committed with knowledge that the intentional wrongful acts violated the law. The court of appeals found the instruction to be legally incorrect and petitioners apparently agree.

The question of the proper scope of appellate review in qualified immunity cases, in addition to already being decided by this Court in *Mitchell, supra*, is not properly before the Court in this case because the qualified immunity defense does not protect police officers who use excessive force in violation of well-settled law. Therefore,



it is very doubtful that this Court would even reach petitioners' question presented in the event that certiorari were granted.

Simply put, petitioners, presumably knowing that new trial orders are not ordinarily appealable, belatedly raised qualified immunity as an issue in a transparent effort to get the appellate court and this Court to grant plenary review over the district court's decision granting a new trial. This, of course, would go far beyond the appropriate scope of review under the collateral order doctrine as articulated in *Mitchell, supra*. Finally, it is interesting to note that petitioners still do not challenge the qualified immunity instruction actually given by the court below which will presumably be given on retrial and petitioners did not object to the qualified immunity instruction when the jury was charged or in response to respondent's motion for a new trial.

---

### CONCLUSION

Respondent respectfully prays that the petition for certiorari be denied for the reasons set out above.

Respectfully submitted,

CURTIS B. STUCKEY  
STUCKEY & GARRIGAN LAW OFFICES  
P.O. Box 631902  
Nacogdoches, Texas 75963-1902  
(409) 560-6020

*Attorney for Respondent*